No. 20-979

IN THE

Supreme Court of the United States

PANKAJKUMAR S. PATEL and JYOTSNABEN P. PATEL,
Petitioners,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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The government rightly agrees that this Court should review the first question presented: whether 8 U.S.C. § 1252(a)(2)(B)(i) preserves the jurisdiction of federal courts to review a non-discretionary determination that a noncitizen is ineligible for certain types of discretionary relief. As the government acknowledges, the issue is important, there is a clear and entrenched circuit split, and this case presents a good vehicle to resolve the issue.

The government is wrong, however, as to the second question presented: whether an immaterial misrepresentation of U.S. citizenship renders a noncitizen inadmissible under 8 U.S.C. § 1182(a)(6)(C)(ii). The Board of Immigration Appeals addressed this issue in a precedential opinion, concluding that any misrepresentation must be objectively material in order to trigger inadmissibility. *See Matter of Richmond*, 26 I. & N. Dec. 779, 786-787 (BIA 2016). In rejecting the BIA's interpretation, the government relies heavily on the erroneous premise that Congress's failure to use the word "materiality" forecloses a materiality requirement. U.S. Br. 19-20. But when Congress enacts a statute that uses a common-law term, it is presumed to have incorporated the established meaning of that term. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981); *see also* Pet. 29. This Court has held both that (1) "false representation" is a term with a settled common-law meaning, *Field* v. *Mans*, 516 U.S. 59, 69 (1995), and (2) the settled meaning incorporates a materiality requirement, *Neder* v. *United States*, 527 U.S. 1, 25 (1999). At a minimum, the Eleventh Circuit's ruling creates a split with three other circuits over whether Section 1182(a)(6)(C)(ii) is ambiguous—a split that is ripe for this Court's resolution. This case presents a strong vehicle to resolve the question, as reversal on

the materiality issue would likely lead to the case being resolved in Petitioners' favor.

ARGUMENT

I. THE GOVERNMENT CORRECTLY AGREES THAT REVIEW SHOULD BE GRANTED ON THE FIRST QUESTION PRESENTED

Petitioners and the government agree that this Court should grant review on the first question presented. Without this Court's intervention, the entrenched circuit split on the reach of 8 U.S.C. § 1252(a)(2)(B)(i) will fester, frustrating the consistent application of federal law in immigration matters, *Zadvydas* v. *Davis*, 533 U.S. 678, 701 (2001), and leaving in place an erroneous ruling that affects numerous people every year, Pet. 17-18. This Court should thus grant review on the first question presented.

II. REVIEW SHOULD BE GRANTED ON THE SECOND QUESTION PRESENTED

Section 1182(a)(6)(C)(ii) makes inadmissible a noncitizen "who falsely represents" himself or herself to be a U.S. citizen for any purpose or benefit under federal or state law. As Petitioners explained (Pet. 26-29), multiple circuits have determined that this statute may reasonably be read to include a materiality element, and the BIA has held in a precedential decision that it does. The Eleventh Circuit's holding that the statute *unambiguously excludes* a materiality element conflicts with these decisions and ignores the longstanding principle that common-law terms such as "false representation" incorporate their common-law elements. Pet. 29-32. The government's arguments to the contrary are unpersuasive.

First, the government contends that "the plain text [of the statute] strongly suggests that there is no [materiality] requirement" because it does not include the word "materiality." U.S. Br. 19. But the government does not deny that "false representation" is a common-law term or that its traditional meaning includes a materiality requirement. Under those circumstances, this Court has explained that the fact that the statute does not include "an express reference to materiality [does not mean] that Congress intended to drop that element." *Neder* v. *United States*, 527 U.S. 1, 23 (1999). Rather, this Court "*presume*[*s*] that Congress intended to incorporate materiality unless the statute otherwise dictates." *Id.* (quotation marks omitted); *see also Fedorenko* v. *United States*, 449 U.S. 490, 507-508 & n.28 (1981) (statute rendering inadmissible any "'person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States' … only applies to willful misrepresentations about 'material' facts"). The government nowhere explains why that presumption is rebutted here.[1]

The government (at 19-20) relatedly relies on *United States* v. *Wells*, 519 U.S. 482 (1997), and *Kungys* v. *United States*, 485 U.S. 759 (1988), but neither case involved the phrase "false representation"—or, for that matter, any other common-law phrase that carries a

[1] The government states (at 21) that there are "several reasons" to think that "Congress's regulation of noncitizens for purposes of admissibility" differs from the normal common-law rule, but it then makes only cursory references to "meaningfully … different" text, context, and purpose without support for why these asserted distinctions matter. And although the government (at 21) faults Petitioners for citing cases involving the similarly phrased mail, wire, and bank fraud statutes, the government itself relies on a case involving bank fraud, *see* U.S. Br. 19-20 (citing *United States* v. *Wells*, 519 U.S. 482, 490 (1997)).

materiality element. In *Wells*, this Court held that a criminal prohibition on "knowingly mak[ing] any *false statement* or report … for the purpose of influencing in any way the action" of a federally insured bank applied to false statements made with the intent "to influence the institution," whether or not material to the relevant decision. 519 U.S. at 490, 499 (alterations in original; emphasis added). Notably, the *Wells* respondents made "no claims about the settled meaning of 'false statement' at common law" and did not "come close to showing that at common law the term 'false statement' acquired any implication of materiality." *Id.* at 491. If anything, *Wells* supports Petitioners' position, as the Court observed that the use of the term "representation" *does* suggest an implicit materiality requirement. *Id.* at 494 (noting that certain statutes amended by Congress to omit an "express materiality requirement … used the term 'representation' and thus could have included a materiality requirement implicitly").

Similarly, *Kungys* merely held that the term "false *testimony*" does not include a materiality requirement. 485 U.S. at 781 (emphasis added). And again, this Court suggested that the use of the different word "misrepresentation"—akin to the "false representation" phrase at issue here—generally incorporates a materiality requirement. *Id.* ("[t]he common-law tort of misrepresentation … requires a material falsehood"); *accord Wells*, 519 U.S. at 494 (citing *Kungys* for the proposition that "'misrepresentation' ha[s] been held to imply materiality"). Accordingly, the government's cases in no way justify the Eleventh Circuit's misreading of the statute.

Second, the government asserts that there is no split over the meaning of Section 1182(a)(6)(C)(ii) because—beyond the Eleventh Circuit—no circuit has

"adopt[ed] a definitive construction" of the statute. U.S. Br. 23. The government misses the point: the circuits are divided over whether the statute is *ambiguous*. The Second, Third, and Sixth Circuits have indicated that the statute's scope is ambiguous. Because the BIA has definitively and reasonably concluded that the statute *does* include a materiality requirement, *see Matter of Richmond*, 26 I. & N. Dec. 779, 786-787 (BIA 2016), the BIA's interpretation controls in those circuits, as the government effectively concedes. *See* U.S. Br. 22 (acknowledging that the BIA's "interpretation of the immigration laws adopted in a precedential decision would ordinarily warrant judicial deference"). The Eleventh Circuit, by contrast, held that the statute unambiguously *excludes* a materiality element. The resulting possibility of opposite outcomes in different parts of the country is the essence of a circuit split warranting this Court's intervention.

Finally, the government contends that this case is an unsuitable vehicle to address the materiality question for two (meritless) reasons. U.S. Br. 25. As an initial matter, the government argues that review of the second question presented is unnecessary because the government has acquiesced in review of the first. *Id.* This reasoning makes little sense, as both questions provide a sufficient (and independent) basis for reversal. *See* Pet. 1-3.

The government also (incorrectly) argues that Mr. Patel would not be entitled to relief even if there is a materiality requirement because, had Mr. Patel revealed his true immigration status, he would have received a driver's license valid for a shorter duration. U.S. Br. 25. But this Court need not reach that issue, which can—and should—be resolved by the Eleventh Circuit in the first instance once this Court clarifies

"the appropriate [legal] standard." *See, e.g.*, *McLane Co.* v. *EEOC*, 137 S. Ct. 1159, 1170 (2017); *Maslenjak* v. *United States*, 137 S. Ct. 1918, 1931 (2017) ("usual practice" when court of appeals makes legal error is to leave dispute over whether error was harmless "for resolution on remand"). Moreover, neither the IJ nor the BIA adopted the government's expiration-date argument; they (incorrectly) assumed that Mr. Patel was not entitled to *any* driver's license at all—a holding that directly conflicted with Georgia law. *See* Pet. 10-11. Given that basis for the agency's holding, neither this Court nor the Eleventh Circuit could affirm based on the government's alternative expiration-date argument. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."). Had the agency applied the proper legal standard (and the correct view of Georgia law), it likely would have reached a different result. As the dissenting BIA panel member explained, because Mr. Patel would have been issued a license regardless of whether he identified himself as a U.S. citizen, the misrepresentation did not "actually affect or matter to the purpose or benefit sought." Pet. App. 109a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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